United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1262

To be argued by
GILBERT EPSTEIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA :

Appellee :

DOCKET NO.
74-1262

-against- :

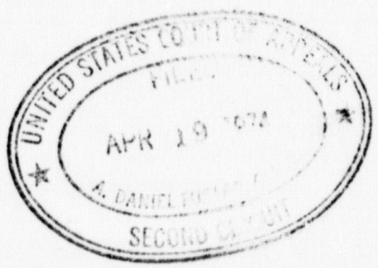
THEODORE FRATTINI, et al. :

Appellant :

- X

BRIEF FOR APPELLANT + APPENDIX

On Appeal From a Judgment Of
The United States District Court
For the Southern District of New York



GILBERT EPSTEIN, ESQ.
Attorney for Appellant
253 Broadway
New York, New York 10007

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BRIEF FOR APPELLANT

QUESTIONS PRESENTED

1. Whether the Court erred in allowing the jury to see incriminating writings made by Federal Agents which had not been received in evidence.

2. Whether the Court erred by failing to hold a hearing to determine whether a juror could understand English.

Statement Pursuant to Rule 28(3)

Preliminary Statement

This appeal is from a judgment of the United States District for the Southern District of New York (the Honorable Robert L. Carter), rendered on February 14, 1974, after a trial by jury convicting appellant of conspiring to distribute a Schedule II narcotic drug controlled substance in violation of 21 U.S.C. §846 and aiding and abetting in the distribution of a quantity of a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. §841(b)(1)(A) and 18 U.S.C. §2. Appellant was sentenced to the care and custody of the Attorney General for three (3) years on Count one. The appellant on count one was to be imprisoned for six (6) months. The remainder of the sentence was suspended and he was placed on probation on count two for three (3) years. Appellant was enlarged on bail pending appeal.

Gilbert Epstein was retained as counsel on appeal.

Statement of Facts

A two-count indictment was filed on November 23, 1973 charging the appellant Theodore Frattini and two others* with conspiring to distribute a Schedule II narcotic drug controlled

*The other defendants, Floyd M. Parton and Steven Cardile were also charged in both counts of Indictment 73 Cr. 1062. The defendant Parton plead guilty to count one of the indictment, and testified for the Government. The defendant Cardile was found guilty on both counts after trial by a jury and is presently appealing his conviction.

substance, cocaine, and with aiding and abetting in the distribution of a schedule II narcotic drug controlled substance. The indictment alleged that between August 1st, 1972, and November 23, 1973 the appellant, in conjunction with the other named defendants, conspired to distribute a Schedule II narcotic drug and controlled substance and further alleged that on October 17, 1972 the appellant did aid and abet in the distribution of a Schedule II narcotic Drug controlled substance, 56.35 grans of cocaine hydrochloride.

The Trial

At the trial*, the first witness for the Government was Douglas L. Driver, a Special Agent with the Drug Enforcement Administration (24, 25). Driver testified that he met Floyd Parton in August, 1972 in the vicinity of a Methadone Clinic on East 53rd Street and they exchanged telephone numbers (25). According to Driver, he had several conversations over the phone with Floyd Parton concerning the purchase of methanphetamine, but no deal was ever consummated (26, 27).

On October 11, 1972, Driver testified he called Parton

* Numbers in parentheses refer to pages of the trial transcript.

at Parton's place of employment and was told by Parton that he knew some people with access to several ounces of methamphetamine. An objection to this conversation was overruled by the Court (27). The following day, October 12, 1972 Driver stated that Parton told him he was unable to get in touch with his people but that Parton discussed with him both methamphetamine and cocaine (29).

On October 17, 1972, the witness testified he spoke with Parton over the phone and they agreed to meet at 7:00 p.m. at the Cross-County Diner in Yonkers for the purpose of purchasing two (2) ounces of cocaine for seventeen hundred dollars. Parton told the witness that he had sampled the cocaine, it was "dynamite stuff", and the price was between nine hundred to one thousand dollars an ounce. Driver in seeking to obtain a lower price, told Parton that he wanted to make more deals in the future and this should be taken into consideration in setting the price. A price of $850 an ounce was finally agreed upon between Driver and Parton (30). Driver testified he drove into the parking lot of the CrossCounty Diner at the agreed time, Met Parton, and they entered the Diner together (33). Upon entering the Diner Parton and the witness seated themselves at a booth next to the window and at this time, according to Driver, Parton stated that he wanted Nine Hundred dollars an ounce for the cocaine or eighteen hundred dollars. Driver testified that he told Parton he only

had seventeen hundred dollars and asked Parton to get in touch with his people (34). Parton then placed a call from a pay telephone situated in the Diner. Driver, who testified he accompanied Parton as he placed the call, heard Parton ask for "Steve or Teddy", but he did not know the number that Parton had dialed (35). Parton, according to Driver, told the party at the other end of the line that he Driver had brought seventeen hundred dollars, was interested in making the deal, and that this was only the first of many deals. After Parton concluded the call, he and Driver returned to the Booth and Parton, according to Driver, said his people had agreed to bring the cocaine and to look out for a Black Cadillac Eldorado (36). Driver stated that after five minutes he saw a yellow chrysler with a black top pull up across the street, and Parton stated "There's my man now," whereupon Parton exited the Diner and entered the yellow Chrysler (37).

The witness stated that after a short period of time, Parton exited the car and re-entered the Diner and asked for the money. Driver refused to turn over the money until he had seen the cocaine and he told Parton that he could just take the money and run (37). Parton again left the Diner and was out of the Agent's view for three to five minutes, but Driver observed the yellow chrysler move from it's original position, and make a left-hand turn into the parking lot of the Diner. When Parton returned,

according to the witness, he had a brown paper bag stuck into his pants, concealed under his sweat shirt. Parton then took one tinfoil packet from the bag and passed it to Driver under the table. Driver put the tinfoil packet into his pocket and stood up to go to the men's room (38). Parton, according to Driver, became excited and Driver told Parton that he merely wanted to test it. Driver then went to the men's room, tested the cocaine, and after getting a positive reaction returned to the booth, where he gave Parton Seventeen Hundred dollars and received a second tinfoil packet (39).

At this point both Driver and Parton exited the Diner, and Driver testified he noticed the yellow chrysler in the same location as when he had first seen it that evening. The appellant Frattini was inside the car, according to Driver, and Parton was walking in the direction of the chrysler (40). Driver stated that after returning to the diner and testing the second tinfoil packet in the men's room, he returned to his booth in the diner and saw Parton returning from the direction of the Chrysler. Parton re-entered the diner and, according to Driver, asked for some of the cocaine. Driver refused, and stated that Parton told him that he had not made any money from the deal, and that he, Driver, still owed fifty dollars on the deal. Driver told Parton he would make it up on the next deal (41).

Driver testified that he next spoke to Parton over the phone on November 18, 1972, and in response to Parton's question he told Parton he was satisfied with the cocaine deal and was interested in meeting the people who had brought it (50). In January of 1973 Driver testified that he spoke to Parton by phone on several occasions, and they discussed a deal for two ounces of methamphetamine, but no transaction ever took place (51).

On February 13, 1973 Driver stated he again spoke to Parton over the phone, and Parton stated that his people had access to methamphetamine, and he would get back to Driver as to quantity and price, but Parton never returned Driver's calls. In May of 1973 Driver and Parton again spoke on the phone and Parton, according to Driver, stated his people had access to methamphetamine, but either they were unwilling to sell, or the price was too high. All these conversations by phone between Parton and Driver were received by the Court over the objections of defense counsel (52). On July 25, 1973 Parton and Driver met at Tony Magner's haircutting, and when Driver asked to be introduced to the individuals who had brought the cocaine on October 17th, Parton replied, according to Driver, that the guy's name was Teddy, and that he was unable to get in touch with him, that he did not know how to get in touch with him. Parton, according to Driver, produced a telephone book and under the name "Teddy" or "T" or "Big T", there were several phone numbers and that one of

the phone numbers matched one he had previously obtained from phone company as belonging to Theodore Frattini (53, 54).

On cross-examination Driver testified that he had seen Parton only once prior to October 17, 1972, outside a Methadone Maintenance Clinic (57). Driver also stated that in July, 1973 Parton told him that he had a contact in Atlantic City, New Jersey named "Barry" who was in a position to supply the methamphetamine (58, 59). Driver also stated that he checked out whether or not Theodore Frattini had a telephone and, if so, what the number was, and that he received a listing of a telephone under the name Josephine Frattini, but he never called that number, nor did he find a listing for a Theodore Frattini in the Yonkers telephone book (72, 73). According to Driver, Parton had sold him a bottle of methadone the first time they met (74), but he was never charged for that first sale (76).

The second witness for the Government was James Steinberg a Special Agent for the Drug Enforcement administration (88). Steinberg testified that on October 17, 1972 at approximately 7:00 p.m. he and Special Agent Borst entered the Cross County Diner in Yonkers, New York and sat down at a booth. Several minutes later, according to Steinberg, Special Agent Driver and Floyd Parton entered and occupied the booth next to his (88). At about 7:15 p.m. that evening both Parton and Driver got up and proceeded to the area of the diner where the phones are situated (103), and

then they returned to the booth they had been occupying. At 7:30 p.m. Parton according to Steinberg, exited the restaurant and returned about ten minutes later. Upon his return Parton leaned forward in his booth and as he did so Driver leaned underneath the table, whereupon Driver got up from his seat and passed the booth occupied by Steinberg. Steinberg observed a foil packet sticking out of Driver's right pants pocket. When Driver returned to the table, according to Steinberg, after a minute or two he was in possession of a brown paper bag containing a second foil packet. Steinberg then stated that he and Driver went to the men's room where Driver displayed two foil packets (89). Steinberg and Driver then returned to their seats in the Diner, and according to Steinberg, Parton then re-entered the diner and stayed with Driver for a minute or so until both Driver and Parton left the diner, with Driver going to a car accompanied by Parton, and Parton continuing on alone to Tony Magner's after Driver entered his vehicle (90).

At the conclusion of testimony on Friday, January 4, 1974 the Court stated to counsel, out of the presence of the jury, that one of the jurors had approached him during lunch and informed him that another juror, Juror number six, Mr. Louis Aponte did not understand English very well (95). The Court then raised the question with counsel whether Juror number six should be excused.

The Government indicated it would have no objection to excusing the juror, provided defense counsel had no objection. The Court then stated that juror number six had originally asked to be excused. Counsel for the appellant Cardile then objected to the removal of juror number six. The Court then made the observation that the juror did not really seem to be following the proceedings, that he was staring out into space (96).

Special Agent Driver was recalled briefly for additional cross-examination (127, 128).

The third witness for the Government was Floyd M.Parton (128). Parton testified that he met Special Agent Driver in the summer of 1972 and had a conversation concerning the purchase of various drugs by Driver (129). Parton told Driver that he knew quite a few people that he could get drugs from (130). On October 10th or 12th, 1972, Parton stated he got a call from Driver who wanted to buy cocaine, and Parton thought he knew some people and that he would call Driver back. Two days later, according to Parton, he received a phone call from defendant Cardile who informed him that he had some "dynamite" coke, and Parton and Cardile made arrangements to meet at Tony Magner's where Parton worked (131).

The following day Parton and Cardile met at Tony Magner's and Cardile, according to Parton, produced a package containing

cocaine, from which Parton took a sample. Parton quoted Cardile as setting the price at one thousand dollars an ounce, and stating that he had four ounces (132, 133). Parton testified that he had purchased cocaine from Cardile on previous occasions (133). Parton called Driver and told him about the coke, but Driver complained about the price and Parton told Driver he would see about the price. The next day Parton called Steven Cardile and they agreed on a price of nine hundred dollars, and Cardile stated he had two ounces available (134). The following Tuesday Parton got in touch with Driver by phone and quoted him a price of nine hundred dollars an ounce. Driver said all he could get was seventeen hundred dollars. Parton then called Cardile and when he told this to Cardile, Cardile refused to make the deal. Parton testified he then took it upon himself to make the deal and arranged to meet Driver at the Cross-County Diner, and then he called Cardile where he worked and arranged to get in touch with Cardile when Driver arrived (135, 136).

When Driver arrived at the Cross-County Diner Parton was there and Driver told him he had seventeen hundred dollars. Upon entering the diner, Parton and Driver took a booth (136), Parton called Cardile and Cardile's wife answered the phone and he asked for Stever or Teddy. Parton spoke to Cardile, and told him that Driver only had seventeen hundred dollars, but

that he was interested in future deals. Parton testified that Cardile then put the appellant Frattini on the phone who agreed to the deal, but refused to meet the purchaser, saying perhaps next time. The appellant Frattini said to Parton he would be at the diner in five minutes (137). Parton testified he hung up the phone and told Driver to look for a Black Eldorado Cadillac. When a yellow chrysler appeared outside the diner Parton stated to Driver "There is one of my boys." Parton testified he then asked Driver for the money, but Driver refused saying he first wanted the merchandise. Parton thereupon left the diner and entered the Appellant Frattini's car (138). Frattini, according to Parton, refused to give him the package without first receiving the money, and Parton then told Frattini that Driver only had seventeen hundred dollars, but that he would make it up on the next deal. Parton exited the car and entered the diner and told Driver that he would have to give him the money, but again Driver refused stating he wanted to see the package first (139). Parton testified he then left the diner again and went to the rear of the diner where both Frattini and Cardile were located in two separate cars. Frattini, according to Parton, agreed to let him have the package and told him to get it from Cardile (140). Cardile then handed Parton a brown paper bag through the window on the driver's side of the car. Parton

re-entered the diner and gave one package to Driver, who then left the booth and went to the men's room from which he returned about twenty second later and he gave Driver the second package after receiving seventeen hundred dollars (141, 142). Parton left the diner a third time and gave the money to Frattini in his car. Frattini then counted the money in Parton's presence, and Frattini said Cardile was upset because either Parton or Driver still owed him one hundred dollars. Parton stated he told Frattini that he had not made ny money on the deal, but that the money owed would be made up on the next deal to which Frattini agreed. Parton testified as he exited Frattini's car he saw Cardile's car pull out of the diner's parking lot (143).

On October 18, 1973 Parton testified he received a call from Steven Cardile who told him that he was owed one hundred dollars by Driver because he, Cardile, had to lay out a lot of money for the cocaine. Parton stated that he told Cardile that the money would be made up on the next deal. According to Parton, the defendant Cardile owned a black Cadillac Eldorado (145).

On direct examination, over objection, Parton testified that he had purchased drugs from the appellant Cardile on nine or ten occasions between August and October 1972 (147). Parton further testified, over objection, that he had purchased drugs

from both of the defendants on trial after October, 1972 (149), although the defendants on trial were never together during these transactions (150).

Parton then testified that he had spoken to the appellant Cardile immediately after all the named defendants in the indictment had been arraigned in the District Court, and Cardile stated to him that he, Cardile, had lied to his lawyer, and that Cardile said, "As far as I am concerned you owe me a lot of money and I wrote down on paper saying that the only reason I was at the diner was to pick up a payment." (155).

On cross-examination Parton stated that when he met Driver in August, 1972 he sold him some drugs (167). According to Parton sometime after October 17, 1972 Frattini, accompanied by Cardile, gave him some cocaine (171, 172, 173). Parton testified that he was addicted to heroin for three years prior to 1968 (182). Parton stated that he had graduated froma beauty culture school, but he was not licensed. Cardile and Parton met, according to Parton, when they were both students at a beauty culture school in 1964 or 1965 (183).

Parton also stated that in the summer of 1971 he was employed at a concession in the same building in which the appellant Cardile's hair dressing establishment was located and,

in that period of time, he saw the appellant Cardile once or twice a week (186). Parton stated that he did discuss with the agents and an Assistant United States Attorney the effect that his cooperation would have on his bail (192) and that because of his cooperation he was released in his own recognizance. According to Parton he was also told that the extent of his cooperation would be presented to the Court to affect his sentence (193). Parton admitted that he sold methadone to Special Agent Driver for ten dollars in August, 1972 and also gave him some amphetamine and he was never charged for distributing those drugs (194, 195). Parton denied he ever borrowed money from the appellant Cardile, but stated he owed Cardile fifty dollars for drugs (19[illegible]).

On further cross-examination Parton stated that after he gave the first foil packet to Driver, it was concealed on Driver's person and it was not sticking out of his pants. Driver, according to Parton, was wearing a brown leather jacket (201, 202).

The next witness for the Government was John McCabe, a detective with the Yonkers Police Department (210, 211). McCabe testified that on October 17, 1972 at about 7:00 p.m. he saw Floyd Parton enter the Cross-County Diner, then he saw him leave the diner after a short period of time and approach a yellow chrysler (211). According to the witness, Parton was seated in

the chrysler with the appellant Frattini. McCabe stated he then lost sight of the chrysler until he saw it again at the location where he had first observed it (212). The witness testified to the route that the chrysler took in going from the vicinity of the diner to 36 Haley Street, and stated that when the yellow chrysler arrived in the vicinity of 36 Haley Street he saw the appellant Frattini exit the car and approach a Red Duster (213). McCabe stated he then saw both Frattini and Cardile inside the Duster and about fifteen minutes he later saw the yellow chrysler drive away, operated by a woman, with the appellant Frattini as a passenger (215, 219).

The fifth government witness was Robert W. Harrington, a Special Agent with the United States Treasury Department (230). Harrington testified that on October 17, 1972 at approximately 7:00 p.m. he was in the vicinity of the Cross-County Diner (231) and he observed Floyd Parton enter the parking lot behind the diner and approach a car, whose make and color he could not make out. Harrington testified that after a while Parton walked away from the first car and came to a second car where he remained only a brief second before leaving the witness' line of vision (233, 249).

The next witness for the Government was Gladstone Griffith,

an analytical forensic chemist (250, 251). The witness testified that both foil packets contained cocaine (252). The laboratory report was then received in evidence, over the objection of defense counsel (254).

The last witness for the Government was Francis M. Dunham, an employee of the Drug Enforcement Agency (256, 257), who testified that the two ounces of cocaine involved in this case would sell on the street for thirteen thousand four hundred dollars.

The defense motions for a directed verdict of acquittal were denied (264).

The appellant Theodore Frattini then took the witness stand in his own behalf (265). Frattini testified he was thirty-one years old, married for six years, and currently employed in a film service lab in Manhattan where he earned one hundred and twenty-five dollars a week (265). The appellant Frattini stated that his mother resided at 12 Raymond Place in Yonkers for the past twelve or thirteen years (266), and that she had a phone; the appellant never used it and that none of his friends or acquaintances call him at that number (267). Frattini testified that in October, 1972 he was working for the Plaza Cab company in Secaucus, New Jersey and his immediate employer was Michael DeMartino.

According to Frattini his hours of work varied; sometimes he worked from early in the morning until night because he was working as a driver and also learning how to be a dispatcher, but that he always worked in the afternoon (270). The appellant testified that it took him from twenty to forty-five minutes to go from Secaucus, New Jersey to his home in the Bronx, and from half an hour to forty minutes to go to Yonkers from his place of employment in New Jersey, depending on the traffic (271). On October 17, 1972 Frattini testified he worked from 2:00 p.m. until a quarter after six when he left work to meet his employer in Yonkers at the Cross-County Diner. Frattini stated that upon arriving at the diner he had a conversation with Floyd Parton while parked in his car, and that Parton mentioned that he had an appointment with defendant Cardile, that he owed Cardile money. Frattini stated he had not noticed where Parton came from as he approached the car (272, 273). The next thing to happen, according to Frattini, was that he pulled into the diner parking lot and saw Cardile parked there. Parton and Cardile were having a conversation, and Cardile's wife and another man was present (273). Parton, according to Frattini, told Cardile that he had someone inside the diner from whom he could get the money, but that Cardile would have to wait a half an hour, which Cardile did not want to do. Frattini testified that he had arranged to meet his

wife at Cardile's house so that they could go out later (274). Frattini stated that Cardile asked him to pick up some money from Floyd and that he, Cardile, would see the witness later. Frattini stated that he remained parked for about twenty minutes on the side of the diner, when Parton came out and gave him some money, which he put in his pocket (275). After moving his car from the parking lot to the front of the diner where he remained for ten minutes, Frattini testified that one of the girls in the diner came out and told him that his employer had called to say he would be unable to keep the appointment whereupon Frattini left the diner and drove to Cardile's house. He stated he did not remember the route that he took (276, 277).

The appellant Frattini testified that when he arrived at Cardile's house his wife was there, and he also saw Cardile to whom he gave the money he had received from Parton. The Frattini's then left the Cardile residence and went to a boutique (280, 281).

The appellant denied having ever given a gram of cocaine to Parton (283), but said he had once had a disagreement with Parton over one hundred and fifty dollars that Parton had received from a woman for bail and did not pay back (284). Frattini testified he had grown up in the neighborhood in which the Cross-County diner was located, and that he had been to the diner on numerous occasions and knew the employees (284, 285).

On cross-examination Frattini testified that during 1972 he worked for the Plaza Cab company on a part time basis, usually from 2:00 p.m. or 3:00 p.m. to 6:00 p.m. (287). Frattini stated that his appointment to meet Mike De Martino was for the half-hour between 7:30 and 8:00 p.m., but that he had not entered the diner that night (288, 289).

Parton, upon first entering Frattini's car, told him why he had not given the money to the girl and he also spoke about the money that he owed to Steven Cardile (290, 291). Frattini stated he was a good friend of Cardile's and had known him for ten years (293, 294).

The next witness for the appellant Frattini was Michael DeMartino (308). DeMartino testified that the appellant Frattini had worked for him at his cab company in New Jersey on a part time basis (309, 310). DeMartino stated he had an appointment to see Frattini at the Cross County Diner to discuss whether Frattini would work for him on a full time basis, but that he was unable to keep the appointment. The witness stated that he called the diner, spoke to someone behind the counter, and told them to tell Frattini that he was still in New Jersey and could not keep the appointment (311, 312). DeMartino also stated that he knew Steven Cardile and his wife (312). On cross-examination the witness stated he was a good friend of Frattini's and had known him for ten or

fifteen years (319).

The third witness called by the appellant Frattini was Louis Crescenzo (320). Crescenzo testified that he had employed Floyd Parton for a month and a half about two and a half years ago in his beauty salon in Mount Vernon (321). Crescenzo stated that he fired Parton when he found him selling drugs in the bathroom (322).

The next witness called by the Appellant was his wife, Maria Frattini (332). The witness testified that she went to meet her husband at Steven Cardile's house, and that they were suppose to meet sometime between 7:30 and 8:00 p.m. (335). Maria Frattini testified that she was in front of Steven Cardile's house, when she saw Cardile drive up followed a few minutes later by her husband. Her husband and Cardile had a brief conversation and then the appellant handed Cardile some money, according to the witness. Mrs. Frattini testified she was then told that they were not going out with the Cardiles so she left to go shopping with her husband (336, 342).

The defendant Steven Cardile then testified in his own defense (347). The defendant Cardile testified that he was twenty-eight years old, and after graduating from high school he attended the Yonkers Beauty School and ultimately became a licensed

hairdresser. After being drafted into the U.S. Army, Cardile stated that he had served and been wounded in Vietnam and had received an honorable discharge from the Service (347, 348, 349, 350). Cardile testified that at present he was a partner in a beauty shop called the Arabesque Hair Design which employs five people and grosses approximately Sixty thousand dollars a year (350, 351).

The defendant Cardile testified he met Floyd Parton in 1964 when they attended hairdressing school, but after school he lost contact with Parton and did not see him again until he left the service (354). In February, 1972, Cardile testified that Parton asked him for a loan of five hundred dollars, and that he did loan Parton two hundred dollars that was to be paid back within two months. Cardile stated that his partner was upset about the loan and that Parton had not repaid the loan by April, 1972, but did promise to pay ten dollars a week (355, 356). Cardile testified that he kept a written record of all payments made to him by Parton and he kept this record in his cash register (357, 358, 362).

On October 17, 1972 Cardile testified he called Parton and demanded full re-payment of the loan, and Parton promised that he would try to get the money. That evening, according to Cardile, he received a phone call from Parton who told him he

had the money and asked him to come to the diner. Cardile said he received the call at sometime between 7:30 and 8:00 p.m. and he drove to the Cross-County Diner (358, 359). Cardile stated that he was accompanied to the diner by his wife and an individual named Lou Mancuso, and when he arrived at the diner's parking lot Parton approached him and told him he did not have the money and asked Cardile to wait a half hour. Cardile then became very upset and told Parton he was going to his boss tomorrow to try and get him fired, and then he drove off and went home (359, 360).

Cardile stated that Teddy Frattini later came by his house, gave him some money and told him it was the money that Floyd owed him (361). Parton made his last payment, according to Cardile on December 7, 1972 (365). Cardile denied ever transfering or possessing any cocaine or methamphetamine at any time (365, 366).

Cardile also stated that he had never been arrested or convicted of a crime. On December 3, 1973 Cardile testified that he had a conversation with Floyd Parton after being arraigned on the indictment in this case and Parton told him he did not know why Cardile was involved, and that he, Parton was the only one involved (366, 368).

On cross-examination Cardile stated that he received fifteen dollars from the appellant Frattini at his house (384).

Douglas L. Driver was then recalled as a witness for the Appellant Frattini (404). Driver stated that Parton had told him he had a partner named Tony and that he got methamphetamines from a chemist (405, 406).

The second witness called by the defendant Cardile was Melvin Kaufman (407). Kaufman testified he was a business partner with Steven Cardile in Arabesque Hair Designers (408, 409). Kaufman testified he met Floyd Parton in hairdressing school some nine or ten years agao (410), and that about a year ago his partner, Steven Cardile, told him he was going to lend Parton two hundred dollars, that he would be getting paid back shortly. Cardile,according to Kaufman, took the money out of the cash register and he eventually paid the loan back to the business (412). After viewing the slip of register paper received as defendant Cardile's exhibit A in evidence Kaufman stated he first saw it about a year ago in the cash register in his place of business (413). The first notation on the slip, according to Kaufman, was "Lent Floyd $200" and that he saw Cardile write on the slip of paper from time to time (414).

The next witness called by the defendant Cardile was Louis Mancuso (422). The witness testified that he had known Steven Cardile for thirteen years, they had attended hairdressing school and that Cardile had worked for him as an employee and a manager for about two years. Cardile finally became partners

with the witness and that partnership lasted about two or three years until Cardile bought him out. Mancuso testified that he had also met Floyd Parton at hairdressing School (423, 424). Mancuso testified that he remembered being at Cardile's house with Cardile and his wife, waiting for Mancuso's wife, when Parton called (425, 426). When Cardile hung up the phone, he told Mancuso that he was going over to the diner to meet Parton, and Mancuso testified that he wanted to take a ride and see Parton (426, 427). Mancuso testified that upon arriving at the diner, Parton approached the car and spoke to Cardile, who then became very mad, and finally Cardile drove off. Mancuso stated that he was in the car with Cardile and Cardile's wife Lucy (428).

On cross-examination Mancuso stated that the amount owed to Cardile by Parton was twenty-five or thirty-five dollars (438, 439).

The fourth witness called by the defendant Cardile was Kenneh Zajac, a criminal investigator for the Westchester County Sheriff's Department (449, 450). Zajac testified that an ounce of cocaine thirty-nine per cent pure would sell for about six hundred dollars (456), with a total value for two ounces would be twelve or thirteen hundred dollars (457).

The defendant Cardile then called his wife Lucy Cardile as a witness testified concerning the events of October 17, 1972 at the cross-county diner and she testified in substantially the

same manner as the earlier defense witnesses.

The next witness called by the defendant Cardile was his attorney, Alfred M. Christiansen (466). Christiansen testified that on December 3, 1973 a conversation took place in the United States Court house at which the witness, the defendant Cardile, the witness Mancuso and Floyd Parton were present, and that Parton stated that the statement giving the initials of two individuals to the agents as the initials of two men with Parton was false (468).

On rebuttal the Government called as it's first witness John McCabe (474). McCabe testified that two ounces of cocaine of thirty-nine per cent strength would retail for about fifteen thousand dollars (478).

The next Government rebuttal witness was Floyd M. Parton (479). Parton testified that on December 3, 1973 he did tell Cardile after their arraignment that he was surprised to see him there because he did not know that Frattini or Cardile had been indicted or arrested (481). Parton further stated that employees of the Government had talked to him about the testimony of other witness concerning the conversation of December 3rd, 1973 (487).

The last rebuttal witness for the Government was Michele Hermann, an attorney who represented Floyd Parton (487, 488).

On January 9th, 1974 after deliberation, the jury found the appellant uilty on both counts. He was sentenced to the care and custody of the Attorney General for three years on count one,with a six-month term of imprisonment, and the execution of the remainder of the sentence suspended. On count two the appellant was placed on probation for three years to run concurrently with count one.

ARGUMENT

POINT I

THE COURT ERRED IN ALLOWING THE JURY TO SEE INCRIMINATING WRITINGS MADE BY FEDERAL AGENTS WHICH HAD NOT BEEN RECEIVED IN EVIDENCE.

During the jury's deliberations the court granted a request by the jury to see the chemist's report. The report included a statement prepared by Special Agent Douglas Driver of the Drug Enforcement Administration implicating the appellant Frattini in the cocaine transaction that was the subject of the indictment. The report of the chemist including the statement had not been received in evidence yet it was allowed into the jury room. This was error and the judgment of conviction should be reversed. United States v. Adams, 385 F2d 548 (2d Cir. 1967; Dallago v. United States, 427 F2d 546 (C.A.D.C 1969); United States v Brown, 451 F2d 1231 (5th Cir. 1971).

In the midst of presenting it's case the Government called as a witness one Gladstone Griffith, a chemist with the Drug Enforcement Administration. At the conclusion of his testimony, the Government sought to introduce into evidence a laboratory report. The Assistant United States attorney referred to the report as Government's exhibit number nine for identification, although the record does not disclose when it was so marked and if it was done in either the presence of the Court or of opposing counsel. Counsel for the appellant Frattini stated that she had no objection to it's being marked for identification, not having seen the document marked for identification earlier. At the time of the Government's offer the clerk was absent from the courtroom, and the marking was deferred to a later time. The record fails to indicate that the document was ever marked or received in evidence.

The record discloses that counsel for both the co-defendant Cardile and for the government (pp. 518-519, 552) commented in their summations upon the statement of Agent Driver that was contained in the lab report, with the Assistant United States Attorney informing the jury that they could take the document into the jury room. Objections were taken to the statements of both counsel by the attorney for the appellant Frattini (pp. 534, 553).

At the conclusion of the Court's charge to the jury, an exception was taken to the Court's charge by the Government where the court had referred to the stipulated testimony of the government chemist (573, 582, 583) as Government's exhibit 2A. When the Assistant United States Attorney referred to Government's exhibit nine, Defense Counsel for appellant Frattini stated that she objected to the receipt of the statement on the report and further that she had not agreed to stipulate to the statement on the report. The stipulation referred to by appellant's trial counsel was one that was being worked out between all parties, but was abandoned when defendant Cardile's counsel would not agree to stipulate to the chemist's report. The court then altered it's charge to discuss the trial testimony of the chemist Gladstone Griffith, but did not mention the laboratory report, Government's exhibit nine.

Shortly after retiring to begin their deliberations the jury asked for and received the laboratory report containing the statement of Agent Driver, and three hours later returned a verdict of guilty on both counts of the indictment against the appellant.

There can be no doubt of the substantial prejudicial effect this document had upon the appellant. The statement itself was hearsay, as Agent Driver did not see any transfer of

contraband on October 17, 1972 aside from the transfer from Parton to himself. The laboratory report and included statement sets forth the name of the appellant, a description of the evidence, the fact that it was purchased from Floyd Parton who received it from the appellant Frattini, a descrioption of appellant's car, and the date, time and place of the sale, thus providing a neat condensation of the entire government case. Sanchez v United States, 293 F2d 260, 268-9 (8th Cir. 1961); United States v Burket, 480 F2d 568, 571 (2d Cir.1973).

The comments of the prosecutor in referring to the report in his summation substantially prejudiced the appellant Frattini. The prosecutor sought to have the jury believe, by using the statement, that there was a conflict betwee: the testimony of Agent Driver and the appellant Frattini when there was in fact no such conflict. The only conflict in the testimony was between that of Floyd Parton and the appellant. The use of the statement in this fashion by the Government allowed a government witness inside the jury room where he testified not to facts, but to his conclusions. The appellant, moreover was further prejudiced, by the use of the report by counsel for the co-defendant Cardile. He used the report to show the jury that the agents on October 17, 1972 or shortly thereafter stated that the cocaine came from the appellant and not from Cardile as the Government maintained.

The only issue to be determined by the jury was that of credibility. The appellant and his co-defendant Cardile both testified and each presented other witnesses on their behalf. The report weighed heavily with the jury as evidenced by the fact it was the only item, aside from the indictment, that they requested during their several hours of deliberation. It was one item that they should never have received because it could not have been properly received in evidence.

> "The principle that the jury may consider only matter that has been received in evidence is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted."
> United States v Adams, Supra, 385 F2d at 550, 551.

The initial confusion concerning the laboratory report can be traced directly to the Government. The report was not initially marked for identification on the record and was never marked nor introduced into evidence. Appellant's trial counsel stated that she had no objection to it's being marked for identification, but because the Government never completed it's offer the matter was not taken up again. In the entire trial the lab report itself was only referred to twice, very briefly, during the testimony of Agent Dunham and Police Officer Zajac and no reference was ever made at anytime to the statement contained

therein. When the report was referred to in summation an objection was taken and again when it was discussed by the Court and counsel prior to its being taken into the jury room counsel stated the position of the appellant Frattini as concerns the report. Sanchez v. United States, Supra, 293 F2d at 269; United States v Rodriquez, 465 F2d 5, 8 (2d Cir. 1972); United States v Burket, Supra, 480 F2d at 571.

The sending of the statement contained in the laboratory report to the jury was error as the statement was not, and could not have been received in evidence.

POINT II

THE COURT ERRED BY FAILING TO HOLD A HEARING TO DETERMINE WHETHER A JUROR COULD UNDERSTAND ENGLISH.

In the course of the trial, but prior to the completion of the taking of testimony the court informed counsel that it had received information that one of the jurors did not understand English very well. The court made the observation that the juror did not seem to be following the proceedings. The court failed to hold a hearing on the competency of the juror in question. This was error and the conviction of the appellant should be reversed, or, in the alternative, the case should be remanded to the District Court for a hearing to determine

whether the juror was competent to serve, United States v. Silverman, 449 F2d 1341 (2d Cir. 1971).

At the close of the Court's session on Friday, January 4, 1973 the court disclosed to counsel that it had received information from a juror that another juror, Mr. Louis Aponte did not understand English very well. The judge made the observation that the juror in question did not seem to be following the proceeding, that he was staring out into space. In view of the issue raised by the court as to whether a juror understood the proceeding, a hearing should have been held at that time. The hearing would have enabled a full inquiry to be undertaken to determine whether the juror was able to comply with the requirements of 28 U.S.C. 1865(b)(2)(3).

The discovery of the juror Aponte's potention disability came at a time when the removal of one juror would have cost the court and the parties to the action little, if any, hardship or inconvenience. The Court had originally sworn sixteen jurors, with four serving as alternates. Surely the Court acted in this fashion so that some unforeseen occurrence, such as what took place here, would not cause a mistrial. The appellant was being tried by a jury of twelve, and he was entitled to have a verdict rendered by all twelve.

The key issue, indeed the only issue, for the jury to

resolve was that of credibility. The conflict was between the testimony of the appellant Frattini and his co-defendant Cardile with that of Floyd Parton, a co-defendant who testified for the Government. All the witnesses agreed that there had been present at the Cross-County Diner on October 17, 1972. The only question was the purpose for which all three had been there. The Government, throught Parton, contending it was for the transfer of cocaine. The co-defendant Cardile claimed he had been at the Diner that nite to collect money from Parton in repayment of a loan. The Appellant Frattini claimed he was at the Diner to meet his employer.

Only three items were received in evidence, and two of the three were foil packets of cocaine. The ability to understand English the language in which all the testimony was uttered, was crucial to the ability of a juror to render a meaningful verdict in the instant case. United States v Silverman, Supra, 449 F2d at 1344.

POINT III

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE APPELLANT FRATTINI HEREBY ADOPTS BY REFERENCE THE POINTS AND ARGUMENTS OF THE APPELLANT CARDILE, INSOFAR AS THEY MAY HAVE APPLICATION TO THE APPELLANT FRATTINI.

CONCLUSION

FOR THE ABOVE-STATED REASONS THE JUDGMENT BELOW SHOULD BE REVERSED AND THE CASE REMANDED TO THE DISTRICT COURT WITH A DIRECTION THAT A NEW TRIAL BE HELD, OR, IN THE ALTERNATIVE THE CASE BE REMANDED TO THE DISTRICT COURT WITH A DIRECTION THAT A HEARING BE HELD TO DETERMINE IF A NEW TRIAL IS WARRANTED.

Respectfully submitted,

GILBERT EPSTEIN, ESQ.
Attorney for Appellant
Frattini
253 Broadway
New York, New York 10007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

UNITED STATES OF AMERICA :

Appellee : Docket No. 74-1262

-against- :

THEODORE FRATTINI :

Appellant :

- -X

APPENDIX

GILBERT EPSTEIN, ESQ.
Attorney for Appellant
Frattini
253 Broadway
New York, New York 10007

JUDGE CARTER

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Nicholas Figueroa, AUSA
FLOYD M. PARTON	264-6551
THEODORE FRATTINI ~ 2/14/74	
STEVEN CARDILE	
	For Defendant:
	Michelle Hermann, Esq.
	Legal Aid, Room 106
	U.S. Courthouse, Foley Sq.
	New York, N.Y.
	Deft. Praton

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED		DISBURSED
ine,			1/24/74	Edel Cocco	✓	-	
lerk,			1/28/74	E. Tan	✓	-	
larshal,			1/29/74	Wilson			10 -
ttorney,							
T.21							
846,812,841(a)(1)							
atr. and possess. w/intent							
distr. CocaineII.(Ct2)				- - -	-		
esp. so to do.(Ct.1)							
(Two Counts)							

DATE	PROCEEDINGS
1-23-73	Filed indictment.
1-3-73	All defts. (attys. present) Plead not guilty. Defts. ordered photographed and fingerprinted. Given 48 hours to post bail. Parton - Bail fixed at $1,000. P.R.B. Frattini- Bail fixed at $5,000 P.R.B. secured by $250.) Cardile- Bail fixed at $5,000. P.R.B. secured by $250.) Case assigned to Judge Carter for all purposes. Bonsal, J.
Dec.4-73	STEVEN CARDILE - Filed Appearance Bond in the amount of $5,000.00 - Deft. posted the sum of $250.00 cash with Clerk U.S.D.C. MONEY #30365 as Security. -Clerk

DATE	PROCEEDINGS	CLERK'S FEES	
	(THEODORE FRATTINI)	PLAINTIFF	DEFENDAN
Dec.3-73	Filed Appearance Bond in the amouht of $5,000.00-shall post the sum of $250.00 Cash with Clerk Receipt # 30021		
Dec.7-73	FLOYD H. PARTON-(atty present) withdraws his plea of Not Guilty and pleads GUILTY to Count 1 only. P.S.R. ordered. Sentence adjourned to 1/15/74. Plea is ordered sealed. Deft. continued on bail of $1,000 P.R.B. unsecured. Plea ordered unsealed on January 4, 1974. - Carter, J.		
Jan.4-74	Trial begun with a jury as to Defts. THEODORE FRATTINI AND STEVEN CARDILE.		
Jan.7-74	Trial continued		
Jan.8-74	Trial continued. Hearing begun as to the long delay in the filing of the Indictment. Hearing concluded.		
Jan.9-74	Trial concluded. Jury Verdict-Deft. FRATTINI-GUILTY on Counts 1 & 2, Deft. CARDILE-GUILTY on counts 1 & 2. P.S.R. ordered sentences adjourned to Feb.14, 1974 at 9:30 in room 129. Defendants continued on present bail with conditions that they report to the Bureau of Narcotics on January 10, 1974 at 9:00 A.M. for fingerprinting and photographing and that they are to stay away from the defendant FLOYD H. PARTON. - CARTER, J.		
Feb.14-74	STEVEN CARDILE - Filed Notice of Appeal from his conviction under Indictment, to U.S.		
Feb.14-74	THEODORE FRATTINI - Filed Notice of Appeal to U.S.C.A. from the judgment of conv entered this date.		
Feb.14-74	THEODORE FRATTINI - Filed JUDGMENT (atty present) It is adjudged that the deft. is hereby committed to the custody of the Attorney General or his authorized rep for imprisonment for a period of THREE (3) YEARS on count 1 and on condition th deft. be confined in a jail type institution for a period SIX (6) MONTHS, the of the remainder of the sentence of imprisonment is hereby suspended and the deft. is placed on probation oncount 2, for a period of THREE (3) YEARS, sub standing probation order of this Court. Bail Pending Appeal is fixed at the amount of $5,000 cash or surety. Carter, J. (copies issued)		

DATE	PROCEEDINGS
Feb.14-74	STEVEN CARDILE - Filed JUDGMENT (atty present) It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS on count 1, and on condition that the defendant be confined in a jail type institution for a per of SIX (6) MONTHS, the execution of the remainder of the sentence of imprisonmen is hereby suspended and the defendant is placed on probation count 2, for a peri of THREE (3) YEARS subject to the standing probation order of this Court. Bail Pending Appeal is fixed at the amount of $5,000 cash or surety - Carter J. (copies issued)
Feb.19-74	Filed Record of Transcript and proceedings dtd 1/14/74
Feb.21-74	FLOYD M. PARTON - Filed JUDGMENT (atty present) It is adjudged that the Imposition of sentence is suspended, and the defendant is hereby placed on probation of TWO (2) YEARS to the standing probatipn order of this Court. On defendant's counsel's motion count 2 is dismissed with the consent of the Government. Carter,J. (copies issued)

intent to distribute narcotic drug.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

-v- :

INDICTMENT

73 Cr.

FLOYD M. PARTON, :
THEODORE PANTINI and
STEVEN CARDILE, :

Defendants . :

- -x

The Grand Jury charges:

1. From on or about the 1st day of August, 1972 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

FLOYD M. PARTON
THEODORE PANTINI and
STEVEN CARDILE

the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

Ed. 5/1/71 intent to distribute narcotic drug.)

MF:cf

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about October 17, 1972, the defendant FLOYD H. FARTON went to the Cross County Diner, 1084 Yonkers Avenue, Yonkers, New York.

2. On or about October 17, 1972, the defendant THEODORE FRATTINI, drove an automobile to the vicinity of the Cross County Diner, 1084 Yonkers Avenue, Yonkers, New York.

(Title 21, United States Code, Section 846.)

NF:cl

SECOND COUNT

The Grand Jury further charges:

On or about the 17th day of October, 1973 in the Southern District of New York,

FLOYD H. PARTON
THEODORE FRATTINI and
STEVEN CARDILE,

the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 56.35 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).) and Title 18, United States Code, Section 2.)

Foreman

PAUL J. CURRAN
United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

FLOYD M. PARTON, THEODORE FRATTINI and STEVEN CARDILE.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

CASE NO. 73 Cr. 1062

JUDGE CARTER

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CHARGE OF THE COURT

(Carter, J.)

THE COURT: Ladies and gentlemen, we come now to that part of the case where all the evidence is in, the lawyers have presented their arguments and you are about to exercise your final role, which is topass upon and decide the fact issues that are in the case.

You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence. You determine the credibility of witnesses and you resolve such conflicts as there may be in the evidence and you draw such reasonable inferences as may be warranted by the testimony or exhibits in the case.

My function at this point is to instruct you as to the law that is applicable to the case. It is your duty to accept the law as I state it to you in these instructions and to apply them to the facts as you find them. The logical result of that application is a verdict in the case.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel either for the government or defense may have said with respect to any matter in evidence, either during the course of the trial, in a question or in a colloquy

with the court, in argument or in summation, is not to be substituted for your own recollection of the evidence.

Similarly, anything the court may have said during the trial or may refer to during the course of these instructions as to any factual matter in evidence is not to be taken in lieu of your own recollection. The case must be decided by you upon the sworn testimony of the witnesses and such exhibits as were received in evidence.

At times during this trial I had been called upon to make rulings on various matters of law, such as when a question was put to a witness was objected to and after a question was answered a motion may have been made to strike the answer.

I have sustained some objections and I have overruled others. It is essential in the performance of your dut that when anything was ordered stricken from the record or rejected, you put it out of your mind and disregard it. Similarly, if a question was asked and an objection to that question was sustained and no answer was given, the question itself should play no part in your deliberations. Please do not concern yourself in any way with my reasons for making any of the rulings that I made on objections. These were purely legal matters.

As I have advised you, there were one or two

conferences at the bench with counsel for the government and for the defendants. As I think I told you, these conferences were solely on questions of law and are of no concern to you and you are not to draw any inferences whatever because someone has asked for a conference at the bench.

Now, in deciding this case, you will be called upon to consider both direct and circumstantial evidence, and it is well now for me to explain the differences between these two types of evidence.

Direct evidence is where a witness or participant testified to what he saw, what he heard or observed, what he knows of his own knowledge, something which comes to him by virtue of his senses. A document can also contain direct evidence.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably flow in the common experience of mankind.

To state that somewhat differently, circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

Now, the circumstantial fact or facts upon which

it is sought to base a disputed fact must be shown and not left to rest on conjecture and when shown, in order to use it to prove a disputed fact there were, it must appear that the disputed fact in question is the only one that can follow from the circumstantial fact and that any other explanation is fairly and reasonably to be excluded.

Now, let me try to give you an example of that, perhaps, so it will be clearer.

You were outside this morning and it was snowing. You saw and you observed it and you can say that it is snowing. That is direct evidence because it is something that you saw and observed.

Now, suppose before the snow started you were in this room and when you looked outside the sun was shining, but you were in this room and the blinds are drawn the way they are now, but a little more completely, so that you couldn't look out, but you begin to see people walking into this room with snow on them and with boots, snow on their clothes and heads. That is circumstantial evidence because of the fact that you don't see it and observe it, but by seeing all these people coming in with snow you assume, therefore, and you can infer that it is snowing outside, and that is the difference between the two types of evidence.

Now, circumstantial evidence, if believed, is of

no less value than direct evidence for in any case you must be convinced beyond a reasonable doubt as to the guilt of the defendants.

There are times when different inferences may be drawn from facts, whether they are proved by direct or circumstantial evidence. The government asks you to draw one set of inferences while the defendants ask you to draw another. It is for you to decide and you alone decide which inferences you will drawn.

It is your function to determine the truth or falsity of the testimony of each witness.

Now, I don't remember whether during the course of this trial that I asked any witness a question, but if I did you are to draw no inference as to the credibility of any witness because I have asked any question of the witness. If I did ask any questions, they were only intended for clarification or to expedite matters. They were not intended to suggest any opinion on my part as to the credibility of a witness who appeared before you.

The question I am sure that you are asking yourselves is, how do you determine the truth and how do you appraise the credibility of the witness?

Well, as I think I told you when this case first started, you use your plain everyday common sense.

In weighing the testimony of witnesses, you can consider their relationship to the government or to a defendant, as the case may be, and any bias or interest in the outcome of the case that they may have based upon that connection, his or her manner while testifying, what was the witness' candor, whether he or she equivocated, whether he was direct or indirect in some testimony, whether he was frank and straightforward, whether he was open or deliberately confusing, whether he was truthful or evasive, the extent to which he or she has been corroborated or contradicted by other credible evidence or whether there were inconsistencies within the witness' own testimony, his criminal record, if any, and whether he has changed his testimony.

Now, an interested witness is not necessarily unworthy of belief. It is a fact, however, which you may consider in determining the weight and credibility to be given to that witness' testimony.

If you find that any witness has wilfully testified falsely to any material fact, you may disregard all of his testimony or accept such part of it as you believe worthy of belief as it appeals to your reason or judgment.

A witness may be discredited by contradictory evidence or by evidence that at some other time the witness

had made statements which are inconsistent with his or her testimony here. If you believe that any witness has been discredited in this manner, you may give the testimony of that witness whatever credibility, if any, you think it deserves.

Now, the government called as a witness Floyd Parton, who, if his testimony is to be accepted, was an accomplice in the crimes charged against the defendants in this case. In the prosecution of crime, the government is frequently called upon to use witnesses who are accomplices. Often it has no choice. The government must rely on witnesses or transactions such as they are.

There is no requirement in the federal courts that the testimony of an accomplice be corroborated. Even without corroboration, conviction may rest upon the testimony of an accomplice if you believe it and find it credible. It does not follow that because a person has acknowledged participation in the crimes charged against the defendants that he is incapable of giving a true version of what he testified to in the case on trial. His testimony, however, should be viewed with caution and scrutinized with care.

The fact that a witness is an accomplice may be considered by you as bearing on his credibility. Was his testimony inspired by any motive of reward, of self-interest

or hostility to the defendants so that he gave false or colored testimony against them in this court before you? If you find that it was, you ought to unhesitatingly reject it

However, after a cautious and careful examination of the accomplice testimony and his demeanor upon the witness stand, if you are satisfied that he told the truth here as to certain events, there is no reason why you should not accept it as credible and act upon it accordingly.

The fact that the government is a party here, that the prosecution is brought in the name of the United States of America, entitles it to no greater consideration than that which is accorded to any other party in litigation. By the same token, it is entitled to no less consideration. All parties, government and individuals alike, stand equal before this court.

Now, as I advised you at the start of this trial, the indictment is merely an accusation, a charge. It is not evidence or proof of the defendant's guilt and no inference of any kind may be drawn from the indictment.

The government has the burden of proving the charges against each defendant beyond a reasonable doubt. It is a burden that never shifts and remains upon the government throughout the entire trial. A defendant does not have to prove his innocence. On the contrary, he is presumed

to be innocent of the accusation contained in the indictment. That presumption of innocence was in his favor at the start of the trial, it continued in his favor throughout the trial, it is in his favor even as I instruct you now, it remains in his favor during the course of your deliberations in the jury room, and it is removed only if and when you are satisfied that the government has sustained the burden of proving the guilt of the defendant beyond a reasonable doubt.

Now, what is a reasonable doubt?

Well, it is a doubt based upon reason which arises from the evidence or lack of evidence in the case. It is a doubt that a reasonable man or woman might entertain. It is not a fanciful or speculative doubt, it is not an imagined doubt, it is not a doubt that a juror might conjure up in order to avoid performing an unpleasant task.. It is not proof to an absolute certainty. Let me repeat, it is a reasonable doubt. It is a doubt that appeals to your reason, to your judgment, to your common understanding and to your common sense. It is a doubt that would cause you to hesitate to act in matters of importance in your daily lives and, on the other hand, the government does not have to prove the guilt of the defendants beyond all possible doubt.

If when you consider the evidence in this case you have a reasonable doubt that the government has proved

any element of the crime charged, then you must return a verdict of acquittal. You may not return a guilty verdict simply because you feel that it is more likely than not that a defendant committed the crime charged. A guilty verdict is only appropriate if each and every one of you is satisfied that the defendant's guilt has been proved beyond all reasonable doubt.

Defendant Cardile has introduced evidence through one witness of his good reputation in his community for honesty, integrity and truthfulness. The introduction of such evidence bears upon the unlikelihood that a person of this character would perpetrate the crimes charged in this indictment and, therefore, you should consider this evidence in the case in determining whether the prosecution has proved defendant Cardile's guilt beyond a reasonable doubt.

Evidence of good reputation may, in itself, create a reasonable doubt as to guilt where without such evidence no reasonable doubt would exist.

On the other hand, if on all the evidence you are satisfied beyond a reasonable doubt that the defendant Cardile is guilty, a showing that he previously enjoyed a reputation of good character does not justify or excuse the offense and you should not acquit him merely because you believe that he is a person of good repute.

gth 11

The testimony of a character witness is a reflection of a reputation in the community. Testimony of character reputation is not to be taken by you as the witness' opinion as to the guilt or innocence of the defendant on the charge in this court. The guilt or innocence of the defendant is for you and you alone to determine.

Consequently, you may consider whether the witness with whom defendant Cardile came into contact previously and with whom he established a community reputation, was not informed or may have been misled in that Cardile did not reveal to him matters bearing on his character. This is a matter for you to determine from all the evidence.

Let me now turn to the indictment in the case.

The indictment charges that the defendants Theodore Frattini and Steven Cardile, in two counts, stated briefly, the first count charges them with conspiring together with Floyd Parton to distribute or possess with intent to distribute a narcotic drug controlled substance.

Count 2 charges the three of them with actually distributing and possessing with intent to distribute a controlled substance.

The defendant Floyd Parton is not on trial here. He has entered a plea of guilty in this case. That plea is his personal statement of guilt. It is not an indication

that the other defendants on trial are guilty and you are not to consider his plea as evidence against them.

I now turn to count 1 of the indictment.

The grand jury charges:

1. From on or about the 1st day of August, 1972, and continually thereafter, up to and including the date of the filing of this indictment, in the Southern District of New York, Floyd Parton, Theodore Frattini and Steven Cardile, the defendants and others to the grand jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together, and with each other, to violate Sections 812, 841(a)1 and 841(b)1(a) of Title 21 of the United States Code.

Count 2. It was part of said conspiracy that said defendants unlawfully and intentionally and knowingly would distribute and possess with intent to distribute schedule 1 and 2 narcotic controlled substances, the exact amount thereof being to the grand jury unknown in violation of Section 812, 841(a)1 and 841(b)1(a) of Title 21, United States Code.

Overt acts.

In pursuance of such conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

1. On or about October 17, 1972, the defendant

Floyd Parton went to the Cross County diner, 1084 Yonkers Avenue, Yonkers, New York.

2. On or about October 17, 1972, the defendant Theodore Frattini drove an automobile to the vicinity of the Cross County diner, 1084 Yonkers Avenue, Yonkers, New York.

The charge in count 1 relates to a violation of the federal narcotics law, Sections 812, 841 and 846 of Title 21 of the United States Code. In pertinent part, Section 841 provides that, "It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

Section 812 sets forth controlled substances in various schedules. Schedule 2 of Section 812 lists the coca leaves or any derivative thereof as a controlled substance. Cocaine is, thus, a controlled substance.

Section 846 makes it a crime to conspire to commit certain offenses, including the offense defined in Section 841.

In order to find either of the defendants guilty of a conspiracy as charged in the indictment, you must be satisfied that the government has proved beyond a reasonable doubt the following:

First, that some time between August 1, 1972, and

November 23, 1973, an agreement existed between the defendants and Floyd Parton, and that it was part of this agreement and understanding either to distribute or possess with intent to distribute schedule 2 narcotic drug controlled substances in violation of the law.

Second, that the defendant whose guilt or innocence you are considering knowingly and wilfully became a participant in the conspiracy with knowledge of its alleged criminal purpose.

Third, that at least one of the alleged conspirators, not necessarily the defendant you are considering, knowingly committed at least one of the overt acts set forth in the indictment at or about the time and place alleged.

If the government fails to establish each of these three elements beyond a reasonable doubt, you must acquit th defendant as to count 1. If the government succeeds in satisfying this burden, you must convict.

As I have informed you, the first of these element which you must find that the government has proved beyond a reasonable doubt is that the conspiracy charged in the indictment existed.

First I want to discuss with you what the term conspiracy means, because that term is here used in a legal context and, therefore, has a somewhat different meaning

than it has when it is used colloquially.

A conspiracy is a combination or agreement between two or more persons to accomplish a criminal or unlawful purpose. The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law. Whether or not the defendants finally accomplished what it is alleged they conspired to do is immaterial. That is to say, the government is not obliged to prove that the purpose of the conspirators was attained.

It has often be said that a conspiracy is a partnership in crime in which each member becomes the agent of every other member. To establish a conspiracy, however, the government is not required to show that the alleged conspirators sat around a table and entered into a solemn comptact, orally or in writing, stating that they had formed a conspiracy to violate the law and setting forth details of their plans. It is sufficient if two or more persons, in any manner, through any contrivance, impliedly or tacitly, come to a common understanding to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

On the other hand, the mere similarity of conduct between various persons and the fact that they may have been associated with each other and may have assembled

together and discussed common aims and interests does not necessarily establish the proof of the existence of a conspiracy.

If, upon the consideration of all the evidence, direct and circumstantial, testimonial or documentary, you find beyond a reasonable doubt that the minds of at least two of the alleged conspirators met in an understandin way and that they have agreed as I have explained a conspiratorial agreement to you to work together in furtherance of the unlawful scheme alleged in the indictment, then proof of the existence of the conspiracy is satisfied.

Once satisfied that the conspiracy charged existed, you must ask yourselves who its members were. You may not assume that a defendant joined a conspiracy simply because you are convinced that he knew or was associated with or had dealings with people who conspired to violate the law. Similarly, the mere fact that two persons are on trial together cannot be considered in any way by you as indicating that they participated in a conspiracy to violate the law.

To conclude that a defendant was a member of the conspiracy, you must find that he knew the unlawful purpose of the alleged conspiracy, that knowing the purpose he intentionally joined in the endeavor and that he had an interest in making it succeed. It is not necessary,

however, that you find that each conspirator was fully informed as to the details or full scope of the conspiracy or participated in every aspect of the conspiracy. A person becomes a member of a conspiracy by associating himself with a common plan or scheme knowing the central aim or principal purpose of that common plan or scheme and intending to bring about its success.

Knowledge and wilfulness and intent exist in the mind and since it is not possible to look into a man's mind to see what goes on the only way you have at arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge, wilfulness and intent were present at the time in question. In making this determination, you should presume that a person intends the natural and probable consequences of his acts.

You will recall that during the trial the acts and statements of one alleged conspirator in the absence of other alleged co-conspirators were received in evidence only with respect to the particular person or persons making them.

However, if you find that a conspiracy existed,

then in considering whether or not a particular defendant was a member of the conspiracy, you may rely not only on his own statements, but on the statements and declarations of the other alleged conspirators.

Moreover, if you find that a conspiracy existed, then any act or declaration made during the conspiracy and in furtherance of it by a person found by you to have been a member of the conspiracy may be considered against any defendant whom you find was also a member, even though such act or declaration was made in the absence and without the knowledge of that defendant.

Now we come to the third element that you must consider as to count 1.

If you have found that the alleged conspiracy existed and that the defendant whose guilt you are considering was a member of it, then you must consider the overt act requirement.

The offense of a conspiracy is complete when the unlawful agreement is made and any single overt act is done by one of the alleged conspirators in furtherance of the conspiracy.

By the term overt act we mean an act committed in an effort to accomplish some object or purpose of the conspiracy. The overt act, in this sense need not be

a crime in itself. It must, however, be an act which follows from the conspiracy and is directed toward the accomplishment of the criminal purposes of the conspiracy.

I will now repeat the overt acts charged in the indictment.

On or about October 17, 1972, the defendant Floyd M. Parton went to the Cross County diner, 1084 Yonkers Avenue, Yonkers, New York.

2. On or about October 17, 1972, the defendant Theodore Frattini drove an automobile to the vicinity of the Cross County diner, 1084 Yonkers Avenue, Yonkers, New York.

You need only find beyond a reasonable doubt that any one and not both of these overt acts was committed and that it was committed during and in furtherance of the conspiracy.

Now let us turn to count 2 of the indictment, which reads as follows:

The grand jury further charges that on or about the 17th day of October, 1972, in the Southern District of New York, Floyd M. Parton, Theodore Fattini and Steven Cardile, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a schedule 2 narcotic drug controlled substance,

to wit, approximately 56.35 grams of cocaine hydrochloride.

The applicable statute is one I read to you in connection with count 1, namely, Section 841 of Title 21 of the United States Code. Once again, Section 841 provides in pertinent part as follows:

"It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

In order to return a verdict of guilty for the crime charged in the second count of the indictment, you must find three elements to have been proved beyond a reasonable doubt.

First, you must find beyond a reasonable doubt that on or about the 17th day of October, 1972, the defendant whose guilt or innocence you are considering distributed or possessed with intent to distribute a narcotic controlled substance.

Second, you must also find beyond a reasonable doubt that the substance which was possessed was, in fact, a schedule 2 narcotic controlled substance. As indicated earlier, cocaine hydrochloride is a schedule 2 narcotic drug controlled substance. Therefore, if you find beyond a reasonable doubt that the government has proved by the stipulated testimony of the chemist that Exhibit 2A is

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cocaine hydrochloride, this element is satisfied. I might add that there does not appear to be any dispute as to this element, but you must still find it to be proved beyond a reasonable doubt.

Finally, you must find beyond a reasonable doubt that the defendant you are considering committed the act of distribution or possession with intent to distribute unlawfully, wilfully, intentionally and knowingly.

You will note that in describing these elements I used the phrase distribute or possess with the intent to distribute. Now, what does this phrase mean?

The word "distribute" means to transfer or deliver other than by administering or dispensing the narcotic controlled substance. The word "possess" as used in the phrase "possess with intent to distribute" has its everyday common meaning, that is, to have something within one's control. Someone with physical custody of an item would possess it within the meaning of this definition.

You must find beyond a reasonable doubt that the defendant was aware of the presence of the substance he was charged with possessing and knew it was a controlled drug. The government is not required to prove both distribution and possession with intent to distribute, it is sufficient for the government to prove either.

It is not necessary for the government to show that the defendants physically committed the crime themselve Section 2 of Title 18 of the United States Code provides in pertinent part that, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induce or procures its commission, or whoever wilfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is guilty of that offense."

Thus, a person who aids and abets another to commit an offense is just as guilty of that offense as he would be had he committed it himself.

Before you can conclude that a person aided and abetted, you must first find that the substantive crime charged in this case, the distribution or possession with intent to distribute cocaine, was, in fact, committed.

Secondly, you must determine that the defendant in some way associated himself with the criminal venture, that he participated in it as something he wished to bring about and by his actions he tried to make the crime succeed. You must find more than the defendant's mere presence during the commission of the crime or knowledge of the offense.

Therefore, if you find beyond a reasonable doubt that Parton, although he is not presently on trial, committed

the offense alleged in count 2 and if you find that Frattini and/or Cardile aided and abetted him, you may find them guilty of count 2.

If, on the other hand, you are not convinced beyond a reasonable doubt that Parton committed the offense or if you are not convinced beyond a reasonable doubt that the defendant you are considering aided or abetted him, you must find that defendant not guilty of count 2.

As you recall, Parton testified that he bought narcotic drugs from Cardile and Frattini on occasions prior to the event described in the indictment. As I instructed you when that testimony was adduced, evidence that the defendant may have committed an act at some other time which is similar to the act here charged may not be considered by you in determining whether the accused committed any act now charged in the indictment, nor may evidence of an alleged earlier similar act be considered by you for any other purpose whatsoever unless you first find that the other evidence in the case standing alone establishes beyond a reasonable doubt that the accused did the particular act charged in the indictment in this case.

However, if you do find beyond a reasonable doubt based solely on the evidence other than prior similar acts that the defendant you are considering did the acts

charged in the indictment in this case, then you may consider evidence as to prior similar acts in determining the state of mind or intent with which the accused did the offense charged here. That is to say, if prior similar acts have been established by the government, then you may, but you are not obliged to, draw the inference that in doing the act charged in this case the accused acted knowingly and intentionally and not because of mistake or accident or other innocent reason.

There has also been testimony introduced indicatin that Steven Cardile communicated with Parton after the arrai ment in order to get him to fabricate his testimony. An attempt to suppress or fabricate evidence by a defendant after a crime has been committed is not, of course, sufficie to establish guilt. You may consider evidence of such an attempt, however, along with the other evidence in the case, in determining the guilt or innocence if you find that evidence credible. Whether or not attempts at fabricatio or suppression of evidence show consciousness of guilt and the significance to be attached to any such attempt are matters that you, as jurors, are to determine.

I have now completed my charge about the specific crimes alleged in the indictment and I will now address myself to more general considerations which you must bear

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in mind during your deliberations.

First, I must emphasize again that there are two defendants on trial and as to each count you must consider separately whether each defendant charged in that count has been proved guilty beyond a reasonable doubt. It is your duty to give separate personal consideration to the case of each defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence submitted solely with regard to the other individual..

Each defendant is entitled to have his case determined from the evidence as to his own acts and statements and conduct and any other evidence in this case which may be applicable to him.

The fact that you may find one of the accused guilty or not guilty on any particular count should not influence your verdict with respect to the other defendant or with respect to the other count.

I might add that in respect of part of the charge I gave you with respect to fabrication or alleged fabrication involving whether Mr. Cardile communicated with Parton is not to be considered by you in any way in respect to Frattini.

As I told you before, the government has the

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burden of proving the charges against each defendant beyond a reasonable doubt. A defendant does not have to prove his innocence. The defendant has the right to remain silent. He doesn't have to testify or present any evidence in his behalf and you may not draw any inferences or conclusions or form any prejudice because a defendant did not testify or present evidence.

On the other hand, the law permits the defendant to testify in his own behalf if he wishes to do so. Both defendants in this case have chosen to testify. The testimony of a defendant must be considered by you as would the testimony or any other witness. You must determine the credibility of the defendant who testifies and in so doing you must consider the deep personal interest which each defendant has in the outcome of his case. Indeed, it is fair to say that any defendant has the greatest stake in the outcome. A defendant's interest in the result of his trial is of a character possessed by no other witness. That interest requires that you are to receive such testimony with caution and in apprising his credibility you may take the defendant's supreme interest into consideration.

However, it by no means follows simply because a person has a vital interest in the end result that he is not capable of telling a truthful, candid and straightforward

story. It is for you to decide to what extent, if at all, his interest has affected or colored his testimony.

Now, under your oath as jurors, you cannot allow consideration of the punishment which may be inflicted upon the defendant if he is convicted to influence your verdict in any way or in any sense to enter into your deliberations. The duty of imposing sentence rests exclusively upon the court. Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendant solely upon the basis of such evidence and the law.

You are to decide the case upon the evidence and the evidence alone. You must not be influenced by any assumption, conjecture or sympathy or any inference not warranted by the facts.

If you fail to find beyond a reasonable doubt that the law has been violated, you should not hesitate for any reason to find a verdict of acquittal. On the other hand, if you should find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

I would like to point out to you that you should not enter the jury room with any preconceived pride of opinion. You should not be unwilling to be convinced by intelligent argument with your fellow jurors. Each juror

has to answer to his or her own conscience and each has to decide this case for himself or herself, but in doing so you should be willing to consider the views of other jurors and to talk things out and try your best to reach a unanimous verdict.

Your verdict must be one with which each juror agrees.

If during your deliberations you deem it necessary to have a copy of the indictment or desire any of the exhibits, they will be sent in to you on request. If you wish any portion of the testimony read or the court's charge reread, that will be done.

In conclusion, let me say that every criminal case is important. It is important to the government and it is important to the defendants. It is your obligation to decide the case on the evidence and on the law as I have charged it to you.

I give the case to you with the assumption that you will do just that.

I will see counsel in the robing room, please.

(In the robing room; counsel present.)

THE COURT: All right, Miss Gerling, I guess you go first. Any exceptions?

MISS GERLING: Yes, Judge. I am going to respectful

except to the statement regarding the sale of drugs by Frattini and Cardile before the alleged operation on October 17th, sir.

THE COURT: All right. Anything else?

MISS GERLING: No, sir.

MR. CHRISTIANSEN: Your Honor, I have the same exception as to your charge in connection with earlier similar acts.

THE COURT: All right.

MR. CHRISTIANSEN: And on the charge in connection with the attempt to fabricate testimony.

THE COURT: All right.

MR. CHRISTIANSEN: And the third one, your Honor, is on the interest of the defendant.

THE COURT: All right.

MR. FIGUEROA: I have one, your Honor.

THE COURT: You don't have any.

MR. FIGUEROA: Yes, I do.

If you will permit, your Honor said that the exhibit was 2A and that there was a stipulation.

Now, I had drawn up stipulation papers, but Mr. Christiansen had requested that the chemist testify. Therefore, the actual exhibits are 17A and 17B and there was no stipulation. Gladstone Griffith was the chemist.

THE COURT: All right. What did I say?

MR. CHRISTIANSEN: Would you like me to get the chemist report?

THE COURT: I don't want the report, I want to find out what I said.

All right, I have it.

What is the name?

MR. FIGUEROA: Gladstone Griffith. There is also Government's Exhibit 9, which is the chemical report which they can consider.

THE COURT: All right.

MISS GERLING: May I just say one thing for the record. I had told Mr. Figueroa that I would stipulate to the chemist's report, but I am going to respectfully except to the admission of the evidence of the statement on the chemist's report. There is no stipulation by me or acceptance.

THE COURT: I am not talking about any statements. He testified and I am just going to talk about his testimony

MISS GERLING: Yes, your Honor.

THE COURT: I am going to say it was the testimony of this man that indicated that this was a controlled substance.

MR. FIGUEROA: Yes, sir.

THE COURT: All right.

MISS GERLING: That is not what I object to, I object to the other statement about Frattini.

THE COURT: What are the exhibits?

MR. FIGUEROA: 17A and 17B.

THE COURT: Those are the packets?

MR. FIGUEROA: Yes.

(In open court.)

THE COURT: I have to correct part of the charge which is about cocaine that I read. I read to you that there was a stipulation, I think, and that the exhibit was 2A. Let me make a correction.

I said in respect of the elements of count 2 of the indictment that the substance which was possessed was, in part, a schedule 2 narcotic controlled substance.

As I indicated earlier, cocaine hydrochloride is a schedule 2 narcotic controlled substance. Therefore, if you find beyond a reasonable doubt that the government has proved by the testimony of Gladstone Griffith, the chemist, that Exhibits 17A and 17B is cocaine hydrochloride, this element is satisfied. I might add there doesn't appear to be any dispute to this element, but you must still find it so to be true beyond a reasonable doubt.

All right.

Mr. LeMay, Mr. Logos, Miss Knapp and Mrs. Laventa, your services are now concluded. I want to thank you. You are excused.

(Four alternate jurors excused.)

(Two marshals were duly sworn.)

THE COURT: All right. You may retire.

(At 1:10 P.M., the jury retired to the jury room to deliberate upon a verdict.)